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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-503

EDWARD C. BELL,
Petitioner,

vs.

RICHARD D. HONGISTO, Sheriff of the City and County of San Francisco, State of California,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The unreported decisions of the California Court of Appeal and California Supreme Court are attached as Appendices B, C, D and F hereto. The opinion of the United States Court of Appeals for the Ninth Circuit, 501 F.2d 346 (1974), appears as Appendix G; and that of the district court, 346 F.Supp. 1392 (N.D. Cal. 1972), as Appendix E attached hereto.

JURISDICTION

Petitioner asserts that this Court's jurisdiction exists pursuant to Title 28, United States Code section 1254(1).

QUESTIONS PRESENTED

1. Is there a denial of equal protection of the law when a person summarily cited for direct contempt of a state court is afforded the safeguard of state appellate review through petitions for writs of habeas corpus or certiorari, a review of equal dimension to that on appeal, but is not granted the right of appeal given to those convicted of misdemeanors and felonies?

2. Is there a violation of the due process clause in the circumstances of this case where an attorney, who refuses to obey a direct order of the court to proceed with trial, is summarily cited in contempt of court therefor and punished?

STATUTES INVOLVED

California Code of Civil Procedure sections 1209, 1211, 1218 and 1222.

STATEMENT OF THE CASE

On January 27, 1972, petitioner, Edward C. Bell, an attorney at law, was found in contempt of court by the Honorable Clayton W. Horn, Judge of the San

Francisco Superior Court, when he refused to obey an order of the court to proceed with a scheduled trial. He was fined $500 and sentenced to serve five days in the county jail. (Appendix A). Execution of sentence was stayed twice by the court, once until January 28, 1972, and then until February 1, 1972, in order to allow petitioner to pursue his appellate remedies.

Petitioner's writ of habeas corpus was denied by the California Court of Appeal on January 27, 1972 without comment. (Appendix B).

On January 28, 1972, the California Supreme Court denied Bell's petition for writ of habeas corpus, the order made final forthwith, also without comment. (Appendix C). A second petition filed by Bell was denied by the California Supreme Court on February 2, 1972, citing *Oak Grove School Dist. v. City Title Insurance Co.,* 217 Cal.App.2d 678, 693 (1963) and *In re Miller,* 17 Cal.2d 734 (1941). (Appendix D).

Petitioner was taken into custody on February 1, 1972 but was released from jail on February 3, 1972, by order of the United States District Court, Northern District of California. Subsequently, the district court granted the petition for writ of habeas corpus, ordering that petitioner be given an appeal from the contempt citation and bail pending such appeal. 346 F.Supp. 1392 (N.D. Cal. 1972) (Appendix E).

Petitioner appealed to the California Court of Appeal which ordered the appeal dismissed in an unpublished order dated March 27, 1973. (Appendix F).

On appeal from the district court's order, a unanimous panel of the United States Court of Appeals for the Ninth Circuit reversed the judgment and remanded the matter to the district court, directing that the writ of habeas corpus be denied. 501 F.2d 346 (9th Cir. 1974) (Appendix G). Bell's petition for rehearing was denied and suggestion of appropriateness for rehearing *en banc* rejected by the Court of Appeals on October 2, 1974. (Appendix H).

A petition for a writ of certiorari to the Ninth Circuit Court of Appeals was filed in this Court on October 30, 1974.

STATEMENT OF FACTS

The facts of this case are not in dispute. At the outset, however, it should be emphasized what factors are *not* presented by this petition. First, all verbal exchanges between petitioner and the court were courteous and respectful, so that no issue of possible unfairness due to the embroilment of human emotions arises. Second, there was no delay between petitioner's contemptuous conduct and the imposition of punishment. After petitioner was given an opportunity to explain his refusal to proceed with trial, he was instantly found in contempt of court on account of that refusal and immediately sentenced. Finally, since petitioner's contemptuous act occurred directly "under the eye" of the court in the judge's chambers, with a court reporter in attendance to preserve all remarks on the public record, no assertion can be

made that events occurring outside the immediate presence of the judge influenced his decision.[1] In sum, what *is* involved here is an act of direct contempt of the court's authority by a willful, albeit polite, refusal to obey a direct order of the court to proceed with trial. We now describe the factual background leading to this contemptuous conduct.

On January 24, 1972, petitioner Edward C. Bell, an attorney for three co-defendants, appeared for trial assignment and to argue a pending discovery motion before San Francisco Superior Court Judge Walter F. Calcagno, the judge in charge of the master criminal calendar. (CT 55-59). The matter was continued on the trial calendar until the morning of January 27,

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[1]Petitioner asserts that the denial of a further stay of execution pending a second petition to the California Supreme Court, and the denial of participation in the Work Furlough Program, resulted from events occurring outside the courtroom. This contention lacks not only merit but also foundation. First, the district court did not hold an evidentiary hearing on this question so that no findings were made regarding any alleged acts of indirect contempt committed by petitioner. Thus, no factual basis exists upon which to presume that such acts influenced the court. Next, the denial of a third stay of execution, when two stays have been previously granted to allow review in the California Court of Appeal and Supreme Court, does not show any impermissible retribution by the court. On the contrary, it merely indicates the court's desire to accord finality to the appellate courts' determination by imposing punishment upon the completion of that review. Finally, the denial of work-furlough status hardly evidences an increase in the severity of punishment. Release from imprisonment under work-furlough is permitted pursuant to California Penal Code section 1208 for those individuals imprisoned in county jails who can show that they are gainfully employed. Presumably petitioner would have qualified for this release. But if a contempt citation is meant to have any sting attached to it at all, petitioner's immediate release, allowing him to be freed and to resume his law practice, would not serve this purpose. The judge simply intended that petitioner serve the sentence imposed upon him.

1972, at which time Judge Calcagno ordered the case transferred to Superior Court Judge Clayton W. Horn for trial beginning at 1:30 that afternoon. (CT 60-61). Petitioner voiced no objection either to the speedy commencement of trial or to the assignment of Judge Horn. (See CT 61).

Apparently unaware of Judge Horn's reputation, petitioner returned to his office where he telephoned two more "experienced" attorneys to solicit their opinion about Judge Horn and whether he [Bell] should move to have the judge disqualified. When told by these fellow members of the bar that Judge Horn was likely to be prejudiced against his clients because of the nature of the defense he intended to pursue, Bell immediately prepared an affidavit of disqualification against Judge Horn pursuant to California Code of Civil Procedure section 170.6. (See Appendix E at viii, n. 1). He then presented the motion to Judge Calcagno at about 1:00 p.m. when the court reconvened, but Judge Calcagno rejected petitioner's motion to disqualify Judge Horn as untimely. (CT 65).

Shortly before 1:30 p.m., Bell proceeded to Judge Horn's chambers where he tried to renew his peremptory challenge, informed the court of Judge Calcagno's earlier ruling, and explained to the court his reasons for not wishing to proceed with trial. (CT 64-66). However, Judge Horn declined to overrule Judge Calcagno's decision stating:

> The Court: Well, as previously indicated, we are ready to go to trial and as I stated to Mr. Bell off the record, I do not intend to overrule

Judge Calcagno, and I am ready to proceed with the case.

So, therefore, to be specific at this time, Mr. Bell, I order you to proceed with the trial of this case forthwith. And, what is your reply to that?

Mr. Bell: My reply to that, your Honor, is that I feel that if I proceed to trial at this time I will waive my right, my clients' right to peremptorily challenge his Honor and therefore in reference to my professional conduct as a member of the Bar I cannot proceed.

The Court: Well, you refuse to go to trial?

Mr. Bell: I refuse to go to trial, your Honor.

The Court: All right. Is there anything else that you have to present on the record at this time before I make a finding?

* * * *

Mr. Bell: No, there is nothing else.

The Court: All right. The Court will find you in contempt of court in disobeying a direct order to proceed with the trial, you having the ability to so proceed and there being no legal cause or sufficient excuse being shown for not proceeding, and the sentence of the Court will be that you are to be confined in the County Jail for five days and pay a fine of $500. . . . (CT 66-67).

At the time that petitioner refused to proceed with trial some 50 prospective jurors who had been summoned for the trial were waiting outside in the courtroom. (CT 32). Since Judge Horn transferred the underlying criminal action to the Master Calendar Judge for reassignment, it appears that another case was required to be substituted for that action.

Execution of sentence was stayed twice by Judge Horn while Bell's petitions for writs of habeas corpus were being considered by the California Court of Appeal and California Supreme Court. When these petitions were both denied, Bell was incarcerated. After serving approximately two and one-half days of his five-day sentence, petitioner was ordered to be released from jail by the district court.

ARGUMENT

I

THE STATE OF CALIFORNIA MAY, CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION, PROVIDE APPELLATE REVIEW FOR CERTAIN CASES OF DIRECT CONTEMPT EITHER BY PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI, IN LIEU OF A CRIMINAL APPEAL, IN CIRCUMSTANCES WHERE THE SCOPE OF APPELLATE REVIEW IS ESSENTIALLY THE SAME EITHER BY APPEAL OR PETITION.

Petitioner's equal protection challenge to his contempt citation requires that we briefly describe the statutory mechanism for adjudicating contempts of court in California. The California statutory framework delineates contempts of court into two distinct categories: (1) misdemeanor criminal contempts, encompassing some eight separate acts of contemptuous conduct as defined in Penal Code section 166, and (2) contempts of the authority of the court as proscribed by Code of Civil Procedure section 1209. The misdemeanor sanction provided in the Penal Code is a remedy cumulative of the inherent powers of courts

in California to punish summarily those acts of contempt committed in their presence. The distinction between these two classes of contempt reflects a legislative determination that certain contempts of court are by their nature criminal in character and attaches to them the qualities of a criminal offense. *In re McKinney,* 70 Cal.2d 8, 13-14 (1968); *Bridges v. Superior Court,* 14 Cal.2d 464, 480 (1939); *In re Morris,* 194 Cal. 63, 69 (1924); *Farr v. Superior Court,* 22 Cal.App.3d 60, 69 (1971). This statutory distinction thus recognizes that the classes of contempt represent "[e]vils . . . of different dimensions and proportions, requiring different remedies." *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955).

Defendants charged with violating Penal Code section 166 are prosecuted in the same manner as are all other misdemeanants. *In re McKinney, supra* at 14. They are of course entitled to the full panoply of procedural rights normally accorded a criminal defendant. Thus, for example, because the penalty for misdemeanor criminal contempt is a term of imprisonment not exceeding six months in the county jail or a fine not exceeding $500, or both (Pen. Code § 19), the criminal contemnor has the right to counsel. *See Argersinger v. Hamlin,* 407 U.S. 25 (1972); *In re Masching,* 41 Cal.2d 530 (1953). If the defendant were indigent, counsel would be appointed. *In re Henderson,* 61 Cal.2d 541 (1964). And, since such punishment would seem to make this crime a more serious contempt there is a right to trial by jury. *Bloom v. Illinois,* 391 U.S. 194, 198 (1968); *Cheff v.*

Schneckenberg, 384 U.S. 373 (1966); *see Taylor v. Hayes,* ___ U.S. ___, 94 S.Ct. 2697, 2701 (1974). More pertinent here, however, these defendants are entitled to an appeal from any conviction. Cal. Pen. Code §§ 1237 and 1466; *see Douglas v. California,* 372 U.S. 353 (1963). For misdemeanor convictions this right includes the delay attendant in the filing of notice of appeal (Cal. Rules of Court 182), preparing the record on appeal, along with appellant's opening brief, respondent's brief and appellant's reply brief. Cal. Rules of Court 105. Such defendants also have the right to bail pending appeal, Cal. Pen. §1272(2); *In re Newbern,* 55 Cal.2d 500 (1961), although in cases of felony convictions release on bail is discretionary. Cal. Pen. Code § 1272(3).[2]

Those adjudged culpable of a contempt of the authority of the court, on the other hand, suffer markedly different potential penalties and are afforded procedural rights different from those granted criminal contemnors and defendants in general. The maximum

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[2]To the extent that petitioner relies upon the absence of the right to bail as a basis for claiming any impermissible discrimination between summary and criminal contemnors, we submit that he cannot contest the absence of such right in this case. Bell was free from any restraint while his petitions were being considered in the California appellate courts because Judge Horn stayed execution of sentence until his petitions were finally determined. Since the stay of execution served the same purpose as bail by assuring that petitioner would not serve a sentence before appellate review was completed, petitioner was not harmed by the absence of bail in this case. The question in the abstract, whether a contemnor is denied equal protection of the law because not released from imprisonment before finality of the judgment, is simply not before this Court. Hence, petitioner lacks standing to challenge any absence of the right to bail in this case. *See Eisenstadt v. Baird,* 405 U.S. 438, 444 (1972); *United States v. Raines,* 362 U.S. 17, 21 (1960).

sentence for contempt of the authority of the court under California Code of Civil Procedure section 1218 is five days imprisonment with a maximum fine of $500. This limited penalty makes this contempt a "petty offense" at most. *See Taylor v. Hayes, supra* at 2701. Upon the commission of such a prohibited contempt in the immediate view and presence of the court, punishment may be summarily imposed. Cal. Code of Civil Proc. § 1211. Although the summary contempt action is quasi-criminal in nature because its purpose is one of punishment, *Freeman v. Superior Court,* 44 Cal.2d 533, 536 (1955), it is denoted a "civil" matter in recognition of its complete independence from the restrictions imposed in the Penal Code. *United Farm Workers, AFL-CIO v. Superior Court,* 265 Cal.App.2d 212, 214 (1968). In these contempt cases, the judgment of the court is final and conclusive. Cal. Code of Civ. Proc. § 1222. Consequently, there is no statutory appeal from this category of contempt, appellate review being either by petition for writ of habeas corpus or certiorari. *In re Buckley,* 10 Cal.3d 237, 258-259 (1973); *Arthur v. Superior Court,* 62 Cal.2d 404 (1965). This absence of the right to review by statutory appeal is in accord with the procedure at common law and is followed in a substantial number of jurisdictions today. *See generally* Annot., *Contempt Adjudication or Conviction as Subject to Review, Other Than by Appeal or Writ of Error,* 33 A.L.R.3d 589 (1970).

Despite the lack of "appeal," summary contemnors suffer no real injury since the scope of appellate re-

view afforded them by petition for writ of habeas corpus or certiorari is essentially the same under California law as that provided via the route of direct appeal. Although such review is nominally limited to questions of the inferior court's "jurisdiction," due to the widening concept of that term under California law a contemnor receives appellate review as broad as that which can be obtained on appeal. Note, *Contempt: Scope of Review of Contempt Orders in California,* 37 Calif. L. Rev. 301, 302 (1949). The reviewing court may consider whether the alleged conduct constituted a contempt. In addition, it may consider whether there was sufficient evidence to sustain the contempt finding below. *In re Ciraolo,* 70 Cal.2d 389, 394 (1969); *Arthur v. Superior Court,* 62 Cal.2d, *supra* at 409; *Chula v. Superior Court,* 57 Cal.2d 199, 203 (1962); *In re Karpf,* 10 Cal.App.3d 355, 364 (1970). On review of these petitions, the appellate court may not, however, reweigh the evidence relied upon by the trial court. *In re Grossman,* 24 Cal.App.3d 624, 631 (1972). This last restriction is generally applicable both to direct appeals and to petitions for extraordinary writs. Cal. Pen. Code §§ 1235 and 1259; *People v. Mendez,* 27 Cal.2d 20, 29-30 (1945).

Moreover, this scope of review compares favorably with that afforded summary contemnors in the federal courts on direct appeal, since the federal appellate court may also review the sufficiency of the evidence proving the contempt, but may not re-evaluate the factual determination of the district court. *Fisher*

v. Pace, 336 U.S. 155, 160-161 (1949); *In re Dellinger,* 461 F.2d 345, 370-371 (7th Cir. 1972). And, while the federal appellate court may review a contemnor's sentence as an abuse of the district court's discretion, *United States v. Bukowski,* 435 F.2d 1094, 1110 (7th Cir. 1970), this is only because there is no statutory limitation on the sentence which may be imposed, *Green v. United States,* 356 U.S. 165, 188-189 (1958), as there is in California. Cal. Code of Civ. Proc. § 1218. Indeed, California affords even greater protection to individuals cited for contempt than that which is given their federal counterparts. Contrary to the majority and federal rule, *see Walker v. City of Birmingham,* 388 U.S. 307 (1967), in California a contemnor may disobey what he believes is an invalid court order if "the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril." *In re Berry,* 68 Cal.2d 137, 149 (1968).

In conclusion, any differences between the appellate review granted summary contemnors as against that accorded criminal defendants under California law is more apparent than real. Certainly there is no indication that the purported differences result in any discrimination against the class of summary contemnors.

Since "[t]he function of the Equal Protection Clause . . . is simply to measure the validity of *classifications* created by state laws," (*San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 59) (Stewart, J. concurring) we would expect that

petitioner's constitutional challenge would be predicated on his status as a member of the class of summary contemnors. And, because this class is not permitted an appeal, whereas criminal defendants are, the argument would follow that petitioner suffered an unconstitutional discrimination from the denial of the right to appeal. But petitioner nowhere asserts that he is a member of such a class. Rather, he classifies himself as a criminal defendant denied the right of appeal from a criminal conviction.[3] Further confusing the determination as to his status, petitioner also claims as a ground for affording him relief that as an attorney-contemnor the rights of his clients to vigorous representation are somehow involved in this action. This is presumably so because an attorney, in representing what he thought were his client's interests, would probably be more willing to suffer a contempt of court if he could remain free pending appeal from the decision. Thus, petitioner not only incorrectly classifies himself as a criminal defendant, he also seeks to carve out for himself a special subclass of convicted contemnor-attorneys whose clients are purportedly prejudiced by the operation of California contempt statutes. [Parenthetically, we wonder

[3]The district court's opinion adopted petitioner's claim to the status of a criminal contemnor when finding that "the statutory scheme [in California] discriminates against a class of misdemeanants . . . ." 346 F.Supp. at 1394 (Appendix E, *infra* at xi). We believe that acceptance of petitioner's claim to membership in this class is fundamentally erroneous, since petitioner was not convicted of a criminal misdemeanor. The true classification is not between two kinds of misdemeanants but between misdemeanant and summary contemnors.

whether, if petitioner's argument prevailed, an unemployed layman-contemnor who could assert no alleged rights of any clients, would have to be accorded the same relief.] But, petitioner's mislabelling of his classification aside, we think that for purposes of equal protection analysis it is clear that petitioner is in fact a member of the class of summary contemnors, as that class is defined by California statutory law.

Review of state classifications under the Equal Protection Clause initially seeks to determine whether a complainant's fundamental rights or interests are being withheld or infringed. If the rights so impaired are fundamental, the state must shoulder the burden of demonstrating that a "compelling state interest" justifies the disparity in treatment between the legislatively created classes. *E.g., Shapiro v. Thompson,* 394 U.S. 618, 634 (1969). However, the right of appeal is not fundamental. It is neither explicitly nor even implicitly recognized as being of constitutional origin or dimension. *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). Moreover, it is well settled, and as recently as last term re-affirmed, that a state is not obliged to provide any appeal at all, even for those who are criminally convicted. *Ross v. Moffit,* 417 U.S. 600, 606 (1974). Accordingly, the interest in this statutorily created right cannot be considered fundamental under the Fourteenth Amendment. *Lindsey v. Normet,* 405 U.S. 56, 77 (1972); *Douglas v. California,* 372 U.S. 353, 356 (1963); *McKane v. Durston,* 153 U.S. 684, 687-688 (1894). The more stringent standard of re-

view for fundamental rights or interests is, therefore, entirely inapplicable here.[4]

Where rights or interests arguably infringed by a state legislative classification are not deemed fundamental the state's burden is a less onerous one. *Lindsey v. Normet,* 405 U.S. *supra* at 73-74. So long as an appropriate governmental interest is furthered by the differential treatment accorded by a statutory scheme, the classification will be upheld against an Equal Protection Clause challenge. The state classification thus need only "bear some rational relationship to a legitimate state purpose." *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 172 (1972).

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[4]No suspect criteria such as race, *McLaughlin v. Florida,* 379 U.S. 184 (1964), or wealth, *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966), form the basis of the classificatory distinction in this case. As a result, several of the cases upon which petitioner relies (*e.g., Douglas v. California,* 372 U.S. 353 (1963), and *Griffin v. Illinois,* 351 U.S. 12 (1956)) do not fit neatly into an equal protection equation consisting of individual rights on the one side versus state interests on the other. The discrimination in *Griffin* and *Douglas* was grounded on the ability of defendants to pay for certain procedural protections of the criminal justice system. But considerations of defendants' wealth are wholly irrelevant to the merits of their cases. For this reason these classifications were considered suspect. *Smith v. Bennett,* 365 U.S. 708, 710-711 (1961); *Burns v. Ohio,* 360 U.S. 252, 257-258 (1959). Yet, the opposite is true here since Bell's petitions were determined on their merits. Although it would be untoward for this office to ask the individual state judges why they summarily denied Bell's petitions without comment, so that the reasons cannot be conclusively stated, we nonetheless believe that the extent of that review was commensurate with the merits, or lack thereof, of his contentions. Thus, insofar as petitioner relies upon cases involving discrimination based upon wealth, these cases and their ultimate rationale are distinguishable from the instant case.

In a similar vein we also note petitioner's contention that "one meaningful appellate review of a criminal conviction" is a fundamental right. (Pet. at 14). We need only respond that petitioner received not just one but three reviews of his petitions.

Accord, Fuller v. Oregon, 417 U.S. 40, 49 (1974); *United States v. Kras,* 409 U.S. 434, 446 (1973); *Lindsey v. Normet, supra.*

While the purpose or purposes behind statutory classification are sometimes not altogether clear, *Eisenstadt v. Baird,* 405 U.S. 438, 442 (1972), such is not the case here. The purposes served by the summary adjudication of direct contempts are clear, manifestly legitimate and even compelling. These objectives are simply the preservation of order, administrative regularity, and the very dignity and integrity of the court. *See Cooke v. United States,* 267 U.S. 517, 534 (1925). These policies are furthered by a summary determination of contempts in at least two ways. First, the quick adjudication of conduct which obstructs the orderly business of a court has a far greater deterrent effect upon the repetition of such misconduct than does a delayed and protracted appeal proceeding. Second, the trial court would be less hesitant to mete out necessary punishment knowing that a review will follow rapidly from its decision. Surely the California legislature could reasonably conclude that the speedy adjudication of contemptuous conduct is more likely to restore, with all due promptness, the order and administrative regularity absolutely necessary in order for the judiciary to function. *See Fisher v. Pace,* 336 U.S. 155, 159-160 (1949); *cf. Lindsey v. Normet,* 405 U.S. *supra* at 70-71.

The need for rapid adjudication is clearly shown by the facts of this case. Judge Horn had no opportu-

nity to research and study the law regarding petitioner's peremptory challenge to him. Trial was scheduled to begin within a few moments. A panel of prospective jurors was waiting in the courtroom. There was no time for the judge to deliberate upon the matter. He *had* to act quickly. And, the sooner there was an appellate court review of his decision, the sooner both petitioner and the court would know whether the action of either was proper. Upon the conclusion of this determination the underlying trial of petitioner's clients, the real matter of business with which the court and petitioner were concerned, could proceed.

Although petitioner claims great injury by the absence of a right to appeal, as we have already shown, the appellate remedies afforded him are essentially coterminous with an appeal. But even assuming that he has been granted lesser protections than those given criminal defendants generally, and assuming further that petitioner's situation is indistinguishable from those criminal defendants, these factors do not invalidate the statutory scheme here at issue. "The Fourteenth Amendment does not require absolute equality or precisely equal advantages." *Ross v. Moffit,* 417 U.S. *supra* at 612; *San Antonio Independent School District v. Rodriguez,* 411 U.S. *supra* at 24. Alternative procedures may be adopted by the state for individuals whose situations are otherwise arguably indistinguishable, if those procedures further other important state goals. The state need not, for example, waste its money by furnishing an indigent defendant a full transcript on appeal, merely because

a wealthy defendant could afford one, if an alternative device fulfilling substantially the same function as the transcript is made available to the indigent. *Britt v. North Carolina*, 404 U.S. 226 (1971); *see also Ross v. Moffit, supra* at 612. Similarly here, simply because criminal contemnors are granted a full appeal does not mean that summary contemnors must be granted this same right where other, important state policies are furthered by the summary disposition of those contempt citations, and the summary contemnor is afforded an adequate alternative means of appellate review. In light of the minimal sentence which petitioner received, as contrasted with that for a misdemeanor conviction, and the adequacy of the appellate review granted him, we submit that he suffered no invidious discrimination. Accordingly, his equal protection challenge to the operation of the summary contempt statutes was correctly decided by the circuit court and his petition on this ground should be rejected here.

II

THERE IS NO VIOLATION OF DUE PROCESS IN THE CIRCUMSTANCES OF THIS CASE WHERE A COURT ACTS IMMEDIATELY TO PUNISH AS CONTEMPTUOUS CONDUCT THE REFUSAL OF AN ATTORNEY TO OBEY ITS DIRECT ORDER TO PROCEED WITH A SCHEDULED TRIAL.

It is unnecessary to rechronicle here the historical origins of a court's power to cite summarily as contemptuous acts committed within its immediate presence which tend to disrupt its administrative regularity and demoralize its authority. *See generally, Frankfurter and Landis,* "Power of Congress Over Procedure in Criminal Contempts in 'Superior' Federal Courts—A Study in Separation of Powers," 37 Harv. L.R. 1010 (1924). Consistently, in the face of an actual disruption of court proceedings, this Court has recognized that inherent power. *E.g., Codispoti v. Pennsylvania,* ..... U.S. ....., 94 S.Ct. 2687, 2692 (1974); *Eaton v. City of Tulsa,* 415 U.S. 697 (1974); *Ex parte Hudgins,* 249 U.S. 378, 383 (1919); *cf. Illinois v. Allen,* 397 U.S. 337, 343 (1970). Although the summary nature of the proceedings abridges the due process rights normally accorded an individual since there is no need for the further taking of evidence or the assistance of counsel or trial in any form, this exceptional procedure has been justified because the court has witnessed the offense and so is acting on the basis of its own observation, and because it must act immediately to vindicate its dignity and authority. *Cooke v. United States,* 267 U.S. 517, 534-535 (1925); *Ex parte Terry,* 128 U.S. 289, 312-313 (1888).

While petitioner inveighs against the obvious possibilities that a court might abuse its powers in summarily citing an individual for contempt, it is significant that he does not charge that Judge Horn so abused his power in this case. Nor does he deny having committed the act for which he was cited in contempt, or that this conduct obstructed the court in the performance of its duties. Rather, petitioner asserts that the operation of the summary contempt proceedings was unfair here because he presented a substantial defense to the judge's proceeding further with the case; *viz.* that the disqualification motion against Judge Horn was timely so that any further action by the judge was beyond his jurisdiction.[5] We think the short answer to petitioner's contention was given by the California Supreme Court's citation of *Oak Grove School District v. City Title Ins. Co.*, 217 Cal.App.2d 678, 693 (1963), when denying Bell's second petition. That is, the appropriate remedy to test whether or not a judge has been disqualified to act is through a petition for writ of prohibition, or failing that by a later appeal from the final judgment. *Ibid.; Elliott v. Superior Court,* 180 Cal.App.2d 894,

[5]A motion to disqualify a judge for bias cannot, of course, oust the court from its jurisdiction to cite for contempt. If the rule were otherwise, there would exist the absurdity of an attorney moving to disqualify *seriatim* each judge before whom he appeared, refusing to proceed with trial when the motions were denied, and upon being cited in contempt therefor, claiming that the motions presented a legal defense to the jurisdiction of the court and so its ability to cite him for contempt. For this reason, challenges for bias have no application to direct contempt and cannot prevent a court from citing as contemptuous any resistence to the court's ruling on the very motion. *See Mosk,* Direct Contempt, 31 Cal.St. B.J. 510, 519 (1956).

896 (1960). Even though petitioner might disobey the order of the court if he felt it was in excess of the court's jurisdiction, it is only if he correctly assessed his legal position that the violation of the order would constitute no punishable wrong. *In re Berry,* 68 Cal.2d *supra* at 149. Since the California appellate courts held there was no error in the order finding petitioner in contempt, it is clear that he was wrong in his assessment of the law and must suffer the consequences. Bell was not privileged to disobey the court order with impunity. It is not counsel's right to resist an order of the court if a ruling is adverse. His right is only respectfully to preserve the point for appellate review. *Sacher v. United States,* 343 U.S. 1, 9 (1952); *In re Buckley,* 10 Cal.3d 237, 253 (1973).

Petitioner relies upon two decisions of this Court, *Taylor v. Hayes,* ..... U.S. ....., 94 S.Ct. 2697 (1974) and *In re Green,* 369 U.S. 689 (1962), which require some form of notice and hearing before an individual can be found in contempt of court. His reliance is misplaced, however, since both cases are so factually dissimilar from the instant proceedings as to be of little or no precedential support.

In *Taylor,* a defendant representing himself at a criminal trial was held in contempt of court and sentenced to a term of four and one-half years in jail. Judgment was rendered at the end of trial for acts of misconduct which occurred during the trial. These acts involved a series of acrimonious exchanges between the judge and defendant-counsel. In these cir-

cumstances, because the justification for summary adjudication—to preserve order and enable the court to proceed with its business—was no longer applicable, the Court held that before an individual could be so punished for contempt he must be given notice of the charges and a hearing. But a factual situation such as that which is presented here was specifically distinguished, the Court stating:

> "We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. [citation] The usual justification of necessity [citation] is not nearly so cogent when final adjudication and sentence are postponed until after trial." 94 S.Ct. at 2702-03.

Hence, *Taylor* certainly does not require notice and a hearing where sentence was not delayed until after trial, but where the court had to and did act instantly to preserve order by citing as contemptuous petitioner's refusal to proceed with trial. *See Codispoti v. Pennsylvania,* 94 S.Ct. *supra* at 2692.

The case of *In re Green,* 369 U.S. 689 (1962), also concerned acts of contemptuous conduct different from those presented here. In that case the complained-of misconduct by Green, an attorney, was the advice he gave his clients to violate an ex parte injunction. This alleged conduct occurred outside the court's presence. Green was never given the opportunity to establish the absence of the state court's power to act,

or to show the existence of an agreement between opposing counsel to test the validity of the court's order by its violation. This Court there held that a hearing was required at which the defense could be raised that the court lacked jurisdiction because acting in a field reserved exclusively for the National Labor Relations Board. But "[Green] was guilty of no misconduct that fell within the category of acts which constitute contempt in open court, where immediate punishment is necessary to prevent 'the demoralization of the court's authority' . . ." 369 U.S. at 692.

Bell's misconduct occurred in Judge Horn's chambers, with opposing counsel and other court personnel present, just before trial was scheduled to begin while prospective jurors waited outside in the courtroom. No request was made that the proceedings be moved outside, see *Levine v. United States,* 362 U.S. 610, 616-617 (1960), and for all that appears the judge did not do so simply to save petitioner embarrassment. Nevertheless, petitioner's misconduct, occurring within the sight and hearing of the judge, was clearly within the court's presence for purposes of it being considered a direct contempt of court. *Mosk, supra,* n. 5 at 514-515; *see In re Savin,* 131 U.S. 267, 277 (1889). Moreover, in this case, petitioner was granted the "opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi v. Leslie,* 404 U.S. 496, 504 (1972). That is all that the Due Process Clause requires. *Cooke v. United States,* 267 U.S. *supra* at 534. For these reasons, we do not believe that *Green* offers support to the proposition that any

further form of hearing was required in this case where the misconduct constituted an act of direct contempt of the court's authority.

It is difficult to imagine a clearer example of contemptuous conduct which absolutely obstructs the court from conducting its business than is demonstrated here by petitioner's refusal to proceed with trial. Bell's misconduct, personally observed by Judge Horn, would certainly qualify as a direct contempt of court under any definition of that term.[6] As Judge Carter wrote for the Court of Appeals below:

> "If the contempt in the case at bar, occurring at the commencement of a trial, could not be punished summarily by the judge before whom the contempt occurred, then no such contempt could ever be punished by the judge before whom it occurs." 501 F.2d at 357, n. 13 (9th Cir. 1974) (see Appendix G, *infra,* at xxxix).

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[6]The basic distinction between direct and indirect contempts is that direct is committed in the presence of the court, while indirect or constructive contempt is committed outside the presence of the court. *In re McKinney,* 70 Cal.2d *supra* at 10, n. 2. Concerning this distinction, one jurist has remarked "[T]he classification of contempt as direct and indirect is merely a semantic device for differentiating contempts that can be adjudicated summarily from those that can be adjudicated only after adequate notice and hearing." *Chula v. Superior Court,* 57 Cal.2d *supra* at 208 (Traynor, J. dissenting).

CONCLUSION

We believe that this conclusion, as well as that holding no violation of the Equal Protection Clause, were correct. Accordingly, we respectfully urge this Court to deny the instant petition for writ of certiorari.

Dated, January 21, 1975.

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division,
EDWARD P. O'BRIEN,
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HERBERT F. WILKINSON,
Deputy Attorney General,
MORRIS LENK,
Deputy Attorney General,
Attorneys for Respondent.

(Appendices Follow)

Appendix A

Superior Court of the State of California
for the City and County of San Francisco

Department 20

January 27, 1972

No. 81855, 81855-A

The People of the State of California,
Plaintiff,

vs.

Carol Williams, Milton James, Andrew James,
Defendant.

[Filed Jan. 27, 1972]

JUDGMENT AND ORDER IN RE CONTEMPT

The above entitled cause was assigned out for trial by Judge Walter F. Calcagno from the Master Calendar at the Hall of Justice at about 12:00 noon January 27, 1972, the defendants above named and their attorney, Edward C. Bell being personally present at the time and place of assignment.

The cause was assigned to Department 20, Room 375 in the City Hall for jury trial at 1:30 p.m.

At about 1:35 p.m. Judge Clayton W. Horn, Department 20 presiding, received counsel for the

prosecution and the defense in chambers and following a preliminary discussion the court ordered Edward C. Bell, attorney for said defendants, to proceed to trial, the Court and District Attorney being ready and 50 prospective jurors having been summoned for said trial.

A lawful order was given to the said Edward C. Bell to proceed with the trial forthwith in said department. That said Edward C. Bell was present and heard and understood the order, had the ability to proceed with the trial, at the ordered time and place, but refused to so proceed. That such refusal of said lawful order was wilful, contemptous and without sufficient reason or any legal cause.

It is Hereby Ordered, Adjudged and Decreed that the said Edward C. Bell is in contempt of this Court in his failure to obey such lawful order, and that he be taken into custody of the Sheriff of the City and County of San Francisco and be confined to the County Jail for a period of five days, and, further, that he is fined and ordered to pay the sum of $500.00 in addition to said period of confinement.

Be it further ordered that execution of this order be stayed until 9:30 a.m., January 28, 1972, and the said Edward C. Bell is ordered to appear in said Department 20 on January 28, 1972, at 9:30 a.m. without further notice or order.

Dated: January 27, 1972.

/s/ Clayton W. Horn
Judge of the Superior Court

Appendix B

Court of Appeal of the State of California
in and for the
First Appellate District

Division Three

Crim. No. 10408

In re Edward C. Bell on Habeas Corpus.

[Filed Jan. 27, 1972]

BY THE COURT:

The petition for a writ of habeas corpus is denied.

Dated Jan 27, 1972

/s/ Draper, P.J.

Appendix C

In the Supreme Court of the State of California
In Bank

Criminal No. 16116

In re Bell
on Habeas Corpus.

[Filed Jan. 28, 1972]

ORDER DENYING WRIT OF HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

This order is final forthwith.

/s/ Wright,
Chief Justice

Appendix D

In the Supreme Court of the State of California
In Bank

Criminal No. 16119

In re Bell
on Habeas Corpus.

[Filed Feb. 2, 1972]

ORDER DENYING WRIT OF HABEAS CORPUS

Petition for writ of habeas corpus DENIED. (Oak Grove School District v. City Title Insurance Co., 217 Cal. App. 2d 678, 693(1)(2)(3); In re Miller, 17 Cal. 2d 734.)

This order is final forthwith.

/s/ Wright,
Chief Justice

Appendix E

United States District Court
for the Northern District of California

No. C-72 206 AJZ

Edward C. Bell,
Petitioner,
vs.
Richard D. Hongisto, Sheriff of the City and County of San Francisco, State of California,
Respondent.

[Filed Aug. 16, 1972]

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS.

On January 27, 1972, the Honorable Clayton Horn of the Superior Court in and for the County of San Francisco cited petitioner Edward C. Bell, a member of the bar of the State of California, for criminal contempt and summarily imposed a sentence of five days in jail and a fine of five hundred dollars, which sentence was stayed until February 1, 1972 to permit petitioner to seek habeas corpus relief from the appellate courts. On the same afternoon, the Court of Appeal for the First Appellate District denied petitioner's petition for a writ of habeas corpus without

opinion. On January 28, 1972, and again on February 2, 1972, the California Supreme Court also denied two successive, but separate, petitions for habeas corpus. Meanwhile, petitioner had begun serving his sentence in the San Francisco County Jail; on February 3, 1972, he was released by order of this court pending final determination of this cause. The matter came on regularly for hearing on March 21, 1972, and after oral argument counsel for both sides expressed their view that the case was ripe for submission and their corresponding willingness to submit the case at that point for decision by the court.

Although counsel differed slightly in their presentation of the facts of this case, such differences as do exist appear to the court to be inconsequential to this decision. The operative facts, which the court summarizes below, are not in dispute:

On January 24, 1972, petitioner appeared on behalf of three defendants in the case of *People v. James*, No. 81855, before the Honorable Walter Calcagno, the Master Criminal Calendar Judge of the Superior Court, at which time he renewed a discovery motion which Judge Calcagno had previously denied without prejudice to such renewal. After a conference with counsel, Judge Calcagno scheduled the motion for hearing before him at 11:30 a.m. on January 27, 1972. Petitioner appeared at that time whereupon Judge Calcagno assigned the case, including the motion, to Judge Clayton Horn for trial at 1:30 p.m. and adjourned the proceedings for the noon recess. Petitioner did not immediately exercise his right to

disqualify Judge Horn under Section 170.6 of the California Code of Civil Procedure.[1] However, at the conclusion of the proceedings, petitioner, who is apparently inexperienced in handling criminal matters, solicited the advice of two colleagues who told him that in their opinion he should disqualify Judge Horn.

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[1]Section 170.6 provides in pertinent part:

(1) No judge or court commissioner of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that such judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in such action or proceeding.

(2) Any party to or any attorney appearing in any such action or proceeding may establish such prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge or court commissioner before whom such action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of such party or attorney so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge or court commissioner. Where the judge or court commissioner assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least five days before that date. *If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial.* In no event shall any judge or court commissioner entertain such motion if it be made after the drawing of the name of the first juror, or if there be no jury, after the making of an opening statement by counsel for plaintiff, or if there be no such statement, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. . . . [emphasis supplied]

(3) If such motion is duly presented and such affidavit or declaration under penalty of perjury is duly filed or such oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge or court commissioner to try the cause or hear the matter. . . .

After determining to accept their advice in the interest of his clients, petitioner prepared and executed an affidavit in support of his motion to disqualify Judge Horn pursuant to the requirements of Section 170.6 and presented the affidavit to Judge Calcagno at approximately 12:55 p.m. when the court reconvened. Judge Calcagno advised petitioner that his challenge to Judge Horn was not timely.

Petitioner reported to Judge Horn's court shortly before 1:30 p.m. and, upon the arrival of the Deputy District Attorney assigned to the case, presented his affidavit to disqualify Judge Horn in chambers. Judge Horn rejected the affidavit and informed petitioner that if he did not proceed to trial he would be held in contempt of court. In response to a direct order to proceed, petitioner refused. Judge Horn cited him for contempt on the basis of his finding that the refusal was "wilful, contemptuous and without sufficient reason or any legal cause." Upon the expiration of the stay granted by Judge Horn, petitioner served nearly two days of his sentence before he was released by order of this court. He is presently at large on his own recognizance.

Petitioner makes three arguments in support of his petition for a writ of habeas corpus. In two related, but conceptually distinct, arguments petitioner attacks on due process grounds the manner in which Judge Horn exercised his contempt powers. Petitioner argues, first, that since his motion to disqualify Judge Horn was "timely" under settled principles of California law, his contempt citation was at best ar-

bitrary and at worst discriminatory; and, second, that the use of the summary contempt power in the circumstances of this case was an "abuse" of the court's power. In his third argument, petitioner challenges on equal protection grounds the statutory scheme which excludes both the right to appeal and the right to bail pending appeal as incidents of an adjudication of contempt. The court will consider petitioner's equal protection argument first.

The structure of petitioner's equal protection argument is relatively straightforward. Under California law, every individual convicted of a crime has a right to appeal whether it is a felony or a misdemeanor. Calif. Penal Code §§ 1237, 1466. While bail pending appeal is a matter of discretion for convicted felons, *id.* § 1272(3), convicted misdemeanants are entitled to bail pending appeal as a matter of right, *id.* § 1272(2). Thus, misdemeanants are by California law absolutely entitled to an appeal and bail pending the outcome of that appeal. However, a contemnor has no right to appeal, Calif. Code Civ. Pro. § 1222, or to bail pending appeal.[2] Since criminal contempt is a misdemeanor, Calif. Penal Code § 166, petitioner argues that depriving a misdemeanant contemnor of the right to appeal and bail pending appeal is a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United

[2]Calif. Code Civ. Pro. § 1222 provides: "The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." The court may impose a fine not exceeding five hundred dollars or five days imprisonment, or both. *Id.* §§ 1211, 1218.

States. While there is no question that the statutory scheme discriminates against a class of misdemeanants, the question before this court is whether that discrimination is in fact unconstitutional.[3]

In a series of decisions throughout the last 30 years the United States Supreme Court has identified a number of interests as "fundamental" and recognized that these interests deserve special consideration under the equal protection clause.[4] While the court has not articulated a general formula to distinguish "fundamental" interests from others, it has deemed these interests important because they are "individual and personal," *Reynolds v. Sims,* 377 U.S. 533, 561 (1964), and touch upon a "sensitive and important area of human rights," *Skinner v. Oklahoma,* 316 U.S. 535, 536 (1942). To be sure, there is some question whether the right to appeal from a criminal conviction and the incidents of that right are constitutional rights. In *Griffin v. Illinois,* 351 U.S. 12 (1956), the Supreme Court held unconstitutional conditioning direct appellate review of a criminal conviction on the defendant's ability to purchase

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[3]Petitioner challenges the constitutionality of the state statutes here involved insofar as they deny him the right to appeal and bail pending appeal, but he does not seek injunctive relief. Accordingly, although no party to these proceedings has suggested that a three-judge court should be convened, the court observes that a three-judge court is not required. See *Wilson v. Gooding,* 431 F.2d 855 (5th Cir. 1970); *United States ex rel. Murray v. Owens,* 341 F. Supp. 722 (S.D. N.Y. 1972).

[4]*See, e.g., Shapiro v. Thompson,* 394 U.S. 613 (1969) (interstate travel); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966) (voting); *Brown v. Board of Education,* 347 U.S. 483 (1954) (education); *Skinner v. Oklahoma,* 316 U.S. 535 (1942) (procreation).

a transcript, but reaffirmed that the right to appeal was not a constitutional right. The Court there said:

> It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, *McKane v. Durston*, 153 U.S. 684, 687-688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. *Id.* at 18.

Similarly, in *Douglas v. California*, 372 U.S. 353 (1963), the Court held that where the merits of the one and only appeal an indigent had of right were decided without benefit of counsel, there existed an invidious discrimination between the rich and the poor which violated equal protection.[5] See also *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Burns v. Ohio*, 360 U.S. 252 (1959). As the Court put it in *Rinaldi v. Yeager*, 384 U.S. 305, 310-11 (1966): "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of un-

[5]To the extent that the underpinning of these cases, notably *Griffin* and *Douglas*, was the fact that the classifications were based on wealth, that the underpinning has been seriously eroded by *James v. Valtierra*, 402 U.S. 137 (1971), *rev'g* 313 F. Supp. 1 (N.D. Cal. 1970) (three-judge court).

reasoned distinctions that can only impede open and equal access to the courts."

Thus, while appeal and the right to bail pending appeal may not be constitutional rights, the question yet remains whether the interest which they protect is fundamental for purposes of applying the equal protection clause. In the court's review, it is. What is at stake here is petitioner's transcendent personal interest in his liberty pending termination of what the State of California recognizes as an integral part of the administration of justice in all misdemeanor cases with the sole exception of misdemeanor contempts.

> [T]he right to bail [pending appeal] is "fundamental" in that it involves issues of personal freedom in the most basic and literal sense of those words. . . . The harm done to an innocent defendant who "serves time" before his conviction is reversed on appeal cannot be undone and serves as a continuing affront to our sense of justice. There may well be times when the State is justified nonetheless in denying bail pending appeal. But when different standards are applied to bail applications based upon an apparently arbitrary classification, the courts are not obliged to accept hypothetical or unfounded excuses for the distinction drawn. *United States v. Thompson,* 452 F.2d 1333, 1340 (D.C. Cir. 1971).

Since what is involved is a fundamental right, what Judge Skelly Wright has called "no less than the freedom to be free," *id.,* the court concludes that the classification California has drawn between misde-

meanant contemnors and all other misdemeanants must be subjected to close and careful scrutiny.[6]

The respondent[7] offers several justifications for the distinction it has drawn. None of these asserted justifications can withstand the strict scrutiny which the court must bring to bear on the classification here involved; the court entertains considerable doubt whether they would be valid even if the court applied the usual equal protection standard which requires only a rational basis for the classification.

First, the respondent argues that the crime here involved is a "petty offense," not a serious crime. However, unlike cases in which such a dichotomy may validly be the basis for disparate treatment when

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[6]Usually, especially in the areas of economic regulation or social welfare, the courts will not overturn a classification the legislature has drawn of it has a "rational basis." See, *e.g., Dandridge v. Williams,* 397 U.S. 470 (1970); *Levy v. Louisiana,* 391 U.S. 68 (1968); *Morey v. Doud,* 354 U.S. 457 (1957). When a legislature creates a "suspect classification," however, the courts insist that the state demonstrate an "overriding purpose," *Loving v. Virginia,* 388 U.S. 1, 11 (1967), which is subject to "rigid scrutiny" by the courts. *Korematsu v. United States,* 323 U.S. 214 (1944). When a "fundamental interest" is at stake, the standard of scrutiny approaches the rigor of the latter test. See, *e.g., United States v. Thompson,* 452 F.2d 1333, 1340 (D.C. Cir. 1971): "The courts have been particularly careful to inspect classications relating to the criminal process, even in cases where it could not possibly be contended that constitutional rights are involved." (citations omitted)

[7]The petition for habeas corpus properly names Richard Hongisto, Sheriff of the City and County of San Francisco, as the respondent. On February 10, 1972, respondent filed a return disclaiming any interest in these proceedings. On February 25, 1972, the Honorable Clayton Horn, by and through the City Attorney of the City of San Francisco, made application to appear as amicus curiae. This application was granted. In the interest of convenience and clarity, however, the word "respondent" is used throughout this opinion.

different types of crimes are involved, see *Bloom v. Illinois,* 391 U.S. 184 (1968), here the disparate treatment is accorded to individuals convicted of the same type of crime. The state accords the rights petitioner seeks to persons convicted of all misdemeanors, petty or serious, except misdemeanor contempt. Quite apart from the Supreme Court's rejection of distinctions based on the differences between felony and misdemeanor cases in several recent decisions, see *Argersinger v. Hamlin,* 40 L.W. 4679 (U.S. S.Ct., June 12, 1972); *Mayer v. City of Chicago,* 404 U.S. 189 (1971); *Williams v. Oklahoma City,* 395 U.S. 458 (1969), the court cannot distinguish the potential penalties flowing from a misdemeanor contempt conviction from those flowing from other misdemeanor convictions, especially where the collateral consequences of petitioner's conviction may include disbarment. Calif. Business and Prof. Code §§ 6101, 6103.

Second, respondent points to the availability of state habeas corpus relief as a substitute for an appeal. However, the Supreme Court has long recognized that the writ of habeas corpus does not perform the office of an appeal. *Ex parte Terry,* 128 U.S. 289, 305 (1888). See also *In re Shipp,* 62 Cal.2d 547, 552 (1965); *In re Dixon,* 41 Cal.2d 756, 759 (1953). It is perfectly apparent in California that the procedural and substantive incidents of habeas corpus are not coterminous with the manner and scope of review on appeal. Aside from the summary disposition of habeas petitions, and the restricted scope of inquiry, *Ex parte Hadley,* 57 Cal.App.2d 700 (1943); *Ex parte*

Wilson, 123 Cal.App. 601 (1932), bail is discretionary, Calif. Penal Code § 1476, not a matter of right as on appeal, *id.* § 1272(2). A misdemeanant contemnor may thus serve his entire sentence before obtaining any appellate court consideration at all, even the narrow review available by way of habeas corpus. The mere availability of habeas corpus does not justify denying an appeal to a misdemeanant contemnor any more than its availability would justify denying an appeal to any other class of misdemeanant offenders.

Third, respondent contends that vindicating the dignity of the court justifies summary disposition. While such an interest historically justifies dispensing with a hearing to establish the fact of a contempt committed in the judge's presence, it does not follow that it justifies depriving the contemnor of the right to appeal. In fact, the absence of any such compelling justification is made manifest by the appellate procedure which obtains in the federal system. See *Sacher v. United States*, 343 U.S. 1, 12-13 (1952). This court cannot conclude that the considerations which justify a summary adjudication *ipso facto* justify summary imposition of punishment when, in all other misdemeanor cases, imposition of punishment awaits the outcome of an appeal. To be sure, the State may expedite the determination of appeals from contempt convictions if it chooses, but the State has no interest at all in punishing what the respondent concedes is a "petty offender" prior to according him an appeal on the law and facts, which California has determined to be fundamental to insuring the integrity of the criminal process in all other cases.

In conformity with the foregoing opinion, the court concludes that denying a misdemeanant contemnor an *appeal and bail pending appeal, rights to which all* other misdemeanants are absolutely entitled under California law, violates the Equal Protection Clause of the Fourteenth Amendment. In view of this conclusion, the court expresses no opinion on the validity of petitioner's other constitutional arguments.

It Is Hereby Ordered that the petition for writ of habeas corpus is granted. Petitioner shall have 10 days from the date of this order to file a notice of appeal and application for bail pending appeal in accordance with California law. Petitioner shall continue to be free from the custody of the respondent unless and until he is granted the right to appeal from his conviction, and, in connection therewith, the right to have bail set pending the determination of said appeal.

Dated: August 16, 1972.

Alfonso J. Zirpoli,
United States District Judge

Appendix F

Court of Appeal of the State of California
in and for the
First Appellate District

Division One

Crim. No. 11234

People of the State of California,
Plaintiff and Respondent,
vs.
Carol Williams, et al.,
Defendants,
Edward C. Bell,
Real Party in Interest and
Appellant.

[Filed Mar. 27, 1973]

BY THE COURT:

The motion to dismiss appeal is granted. The appeal herein is ordered dismissed.

Dated, Mar. 27, 1973

/s/ Molinari, P.J.

Appendix G

United States Court of Appeals
for the Ninth Circuit

No. 72-2797

Edward C. Bell,
Petitioner-Appellee,
vs.
Richard D. Hongisto,
Respondent-Appellant

[Filed Jul. 26, 1974]

Appeal from the United States District Court
Northern District of California

OPINION

Before: CHAMBERS, CARTER and WALLACE,
Circuit Judges.

JAMES M. CARTER, Circuit Judge:

Richard D. Hongisto, the Sheriff of San Francisco, appeals from the order of the district court granting a writ of habeas corpus to the petitioner Edward Bell. Bell, an attorney, had been summarily convicted of direct contempt of the San Francisco Superior Court and was sentenced to five days in jail and a $500 fine. After exhausting his state remedies he brought this petition.

We are faced with three issues, each of constitutional dimensions: (1) Does § 1222 of the California Code of Civil Procedure, which denied Bell the *right to appeal* his contempt conviction, thereby violate the equal protection clause of the United States Constitution? (2) Does § 1222, Code Civ. P., which denied Bell *the right to bail* pending review of his conviction by petition for certiorari or habeas corpus, thereby violate the equal protection clause? (3) Does § 1211 of the California Code of Civil Procedure, which permits a *summary punishment* of those persons who commit contempt in the immediate presence of the court, violate the due process clause of the United States Constitution under the circumstances of this case?

The district court answered the first two of these questions affirmatively, and ordered Bell's release without reaching the question of due process. We reverse. While we express no opinion on the wisdom of § 1222, Code Civ. P., we cannot hold it in violation of the equal protection clause. We are thus confronted with the due process question which the district court avoided: and the record developed below is sufficient to satisfy us that § 1211, Code Civ. P., as applied to the facts in this case, has no constitutional infirmity.

The Facts

On January 27, 1972, at 11:30 a.m., attorney Edward Bell appeared on behalf of three criminal defendants before the Master Criminal Calendar Judge of the San Francisco Superior Court. The Master

Criminal Calendar Judge proceeded to assign the case to a trial judge. Bell was told to appear before that trial judge in two hours, that is, at 1:30 p.m. of the same day.

During the noon recess, Bell went to his office and telephoned two other attorneys for advice regarding the assigned trial judge. They informed Bell that the assigned judge was prejudiced in crucial ways.

During the remainder of the noon recess, Bell prepared a motion and affidavit to disqualify the trial judge peremptorily under § 170.6, Code Civ. P.[1] At 12:55 p.m. Bell presented the motion to the Master Criminal Calendar Judge, who denied it on the ground of untimeliness, stating that according to his reading of § 170.6, Code Civ. P., a disqualification motion must

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[1] § 170.6, California Code of Civil Procedure.

"(1) No judge or court commissioner of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that such judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in such action or proceeding.

(2) Any party to or any attorney appearing in any such action or proceeding may establish such prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge or court commissioner before whom such action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of such party or attorney so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge or court commissioner.

(3) If such motion is duly presented and such affidavit or declaration under penalty of perjury is duly filed or such oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge or court commissioner to try the cause or hear the matter. . . ."

be filed at the time a trial judge is assigned. Bell's motion was therefore one hour and twenty minutes too late.

At 1:30 p.m. of that day, Bell appeared as scheduled and renewed the disqualification motion before the trial judge himself, who also denied the motion as untimely, telling Bell to proceed to trial. Bell declined on the ground that, by going to trial, he might be waiving his right to appeal the denial of the disqualification motion.

The trial judge then announced, ". . . Mr. Bell, I order you to proceed with the trial of this case forthwith. And, what is your reply to that?" Bell replied, "I refuse to go to trial, your Honor." Thereupon the trial judge found Bell in direct contempt of court and sentenced him to five days in jail and a $500 fine.

Under California law, Bell had no right *to appeal* this judgment of contempt, but he did have the right *to petition* the higher state courts for a writ of habeas corpus or a writ of certiorari. In order to allow Bell time to file such petitions, the trial judge stayed execution of the sentence until 9:30 a.m. of the following day (the 28th of January) and later extended the stay for four additional days (until February 1).

Bell quickly filed two petitions for review, one with the California Court of Appeals and, later, one with the California Supreme Court. Both petitions were denied. Bell went to jail on February 1, 1972. Subsequently, an additional petition in the California Supreme Court was denied on February 2, 1972.

On February 3, Bell filed a petition for a writ of habeas corpus in the federal district court. The district court ordered his release from custody on grounds that § 1222, Code Civ. P., violated the equal protection clause.

The California Statutory Scheme

Sections 1237[2] and 1466[3] of the California Penal Code provide that the defendants in "criminal" cases have the right to appeal from a conviction.

Section 1272[4] of the Penal Code provides that convicted defendants may be released on bail pending appeal.

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[2] § 1237, California Penal Code.
"An appeal may be taken by the defendant:
1. From a final judgment of conviction except as provided in Section 1237.5.
2. From any order made after judgment, affecting the substantial rights of the party."

[3] § 1466, California Penal Code.
"An appeal may be taken [by the defendant] from a judgment or order of an inferior court, in a criminal case, to the superior court of the county in which such inferior court is located, in the following cases. . . .
(a) From a final judgment of conviction. . . .
(b) From any order made after judgment affecting his substantial rights."

[4] § 1272, California Penal Code.
"When admitted to Bail after conviction and upon appeal. After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail:
1. As a matter of right, when the appeal is from a judgment imposing a fine only.
2. As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor.
3. As a matter of discretion in all other cases."

Section 166[5] of the Penal Code provides that every person guilty of eight specified types of contempt, which are labelled "criminal contempt," is guilty of a "misdemeanor."

Section 1209[6] of the Code Civ. P. lists eleven types of "contempts of the authority of the court." Con-

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[5] § 166, California Penal Code.

"Criminal Contempts. Every person guilty of any contempt of Court of either of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any Court of justice, in immediate view and presence of the Court, and directly tending to interrupt its proceedings to impair the respect due to its authority;

2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any Court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law;

3. Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any Court;

4. Willful disobedience of any process or order lawfully issued by any Court;

5. Resistance willfully offered by any person to the lawful order or process of any Court;

6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question;

7. The publication of a false or grossly inaccurate report of the proceedings of any Court;

8. Presenting to any Court having power to pass sentence upon any prisoner under conviction, or to any member of such Court, any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this Code."

[6] § 1209. California Civil Procedure Code.

"The following acts or omissions in respect to a court of justice or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

tempt proceedings brought under this section, as distinguished from § 166, Penal Code, are not "criminal" proceedings, *as a matter of terminology,* although they are criminal in character. *Pacific Tel. & Tel. Co. v. Superior Court for Los Angeles County,* 265 C.A. 2d 370 (1968).

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2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceedings;

3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person appointed or elected to perform a judicial or ministerial service;

4. Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

7. Unlawfully detaining a witness, or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial;

8. Any other unlawful interference with the process or proceedings of a court;

9. Disobedience of a subpena duly served, or refusing to be sworn or answer as a witness;

10. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

11. Disobedience by an inferior tribunal, magistrate, or officer of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

Section 1211[7] of the Code Civ. P. provides that a contempt committed in the immediate view and presence of the court may be punished summarily.

Section 1222[8] of the Code Civ. P. provides that the judgment of the court in contempt cases is final and conclusive. This section, despite its broad language, does not apply to contemnors labelled "criminal" under the Penal Code, § 166. *In re Buckley,* 10 Cal. 3d 237 (1973).

But it is clear that Bell does not belong to that class of contemnors labelled "criminal" under the Penal Code.[9] Hence § 1222, Code Civ. P., *does apply* to him.

Section 1222, Code Civ. P., as noted above, has been construed by California courts to bar *appeals* but to allow *petitions* for writs of habeas corpus and certio-

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[7] § 1211, California Civil Procedure Code.

"When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.

When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers."

[8] § 1222, California Civil Procedure Code.

"The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive."

[9] The state court did not specify under what statute Bell was convicted, but an examination of the case shows that it could *not* have been § 166, P.C. A " 'violation of section 166 of the Penal Code is a misdemeanor and as such it is to be prosecuted in the same manner as other misdemeanors' rather than under the Code of Civil Procedure for summary contempts." *In re McKinney,* 70 C.2d 8, 14 (1968). "[T]he superior court [has] no jurisdiction

rari. *E.g., Heller v. Heller,* 230 C.A.2d 679 (1964). These remedies limit the inquiry of the reviewing court solely to questions of the inferior court's jurisdiction. *In re Chapman,* 141 C.A.2d 387 (1956). The term "jurisdiction" covers a great deal of ground, however, for the questions of whether a petitioner's alleged acts constituted contempt, and whether the evidence was sufficient to establish those alleged acts, have been held "jurisdictional" inquiries. *In re Ciraolo,* 70 C.2d 389 (1969). Thus the scope of review by petition is practically as broad as the scope of review by appeal. *See* Comment, *Contempt: Scope of Review of Contempt Orders in California,* 37 Calif. L. R. 301 (1949).

Equal Protection

Bell contends that § 1222, Code Civ. P., violates the equal protection clause of the United States Constitution because it precludes an appeal from an order adjudicating a person in contempt of court, and precludes bail pending review by petition, while at the same time § 1237 and § 1466 of the Penal Code allow "criminal" defendants these procedural benefits. (We temper this contention with the observation that persons convicted of contempt under § 166, Penal Code, are indeed permitted to appeal and have bail.)

The California Supreme Court rejected an argument identical to Bell's in *In re Buckley,* 10 Cal.3d

to hear and convict the petitioner of the misdemeanor of contempt of court under section 166 of the Penal Code." *McKinney, supra,* at 13.

Since the superior court punished Bell summarily, and the California Court of Appeals and the California Supreme Court found no jurisdictional error, the judgment of contempt was necessarily not under § 166, P.C.

237 (1973). Since the contention raises a federal question, we are not bound by that state decision and are required to make an independent determination. Yet we must keep in mind that we are dealing with a state statutory scheme and the state case law interpreting and upholding it. Thus, in accordance with our principle of affording state laws a presumption of validity in order to avoid unnecessary federal interference in state affairs, *see McNabb v. United States,* 318 U.S. 332, 340 (1943), we pay deference to the views of the California Supreme Court. The discussion that follows is our own analytical journey to the same end, reached more briskly by that Court.

(a) *Right to appeal*

Respondent contends that Bell's argument regarding a right to equal treatment with "criminal" defendants is eviscerated by the fact that Bell was not held in "criminal" contempt. We reject the respondent's contention. It is true that Bell was convicted under §§ 1209 and 1211, Code Civ. P., not under § 166, Penal Code, and hence was not a "criminal" under the statutory terminology. But Bell's contempt was essentially "criminal" in nature, even if not "criminal" by virtue of § 166, Penal Code, because the purpose of the contempt sanction in this case was punitive rather than compensatory or coercive. *See Morelli v. Superior Court of Los Angeles County,* 1 C.3d 328 (1969); *Gompers v. Bucks Stove & Range Company,* 221 U.S. 418 (1911); *Penfield Co. of California v. Securities & Exchange Com'n,* 330 U.S. 585 (1947); *In re Nevitt* (8 Cir. 1902) 117 F. 448.

Accordingly, we consider the question whether it is constitutionally permissible to deny contemnors suffering essentially criminal sanctions the same right of appeal afforded those defendants actually labelled "criminal."

In equal protection cases, the burden of justification that must be carried by the state is sometimes *heavy* and sometimes *light,* depending on the nature of the classification in question and the nature of the imposition which the state law places upon the encumbered class.

A *strict* standard of judicial review is invoked whenever the state law operates to the disadvantage of a "suspect class" (examples being a class based on race or alienage) or whenever the state law impairs a "fundamental interest" (such as the right to vote or to travel interstate); when such a law is challenged, it will be held unconstitutional unless the state can show it is necessary to promote a compelling state interest.[10]

On the other hand, if the law in question neither injures a "suspect class" nor impairs a "fundamental interest," it will be evaluated under the *general* standard. Under this test, the state law is valid so long as it rationally furthers a legitimate state interest.[11]

In order to choose the correct standard of review in this case, we must ascertain whether or not a fundamental interest is impaired sufficiently to invoke

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[10] *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973) and citations therein.

[11] *Id.*

strict scrutiny. (No serious contention can be made that state law here injures a "suspect class.")

In this inquiry, the leading case cited by Bell is *Griffin v. Illinois,* 351 U.S. 12 (1956), which held that an indigent was entitled to a free trial transcript on appeal. *Cf. Mayer v. City of Chicago,* 404 U.S. 189 (1971). But we do not find *Griffin* or *Mayer* controlling.

First, *Griffin* and *Mayer,* although recognizing the importance of adequate review of a criminal conviction, do not *expressly* call it a "fundamental interest," nor is it clear a strict standard of review was applied.

Secondly, assuming the Court in those cases did in fact *tacitly* find a "fundamental interest" and apply a strict standard of review, the Court did so largely because the classification in question was based on wealth. Classifications based on wealth are "traditionally disfavored." *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 668 (1966). But Bell's class is not indigent.

Since Supreme Court decisions provide no authority for regarding the right to adequate appellate review as "fundamental," we look to the Constitution itself for guidance. The lesson of *San Antonio School District v. Rodriguez,* 411 U.S. 1, 33-34 (1973) is that ". . . the key to discovering whether [an interest] is 'fundamental' . . . lies in assessing whether there is a right to [that interest] explicitly or implicitly guaranteed by the Constitution." *San Antonio School District, supra.*

The Constitution, a basic text of criminal procedure, contains numerous provisions to safeguard the criminal defendant. But in all its provisions, we find no implicit, and surely no explicit, guarantee of the right to appeal. As said in *Griffin, supra,* at 18, "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."

Furthermore, even if the right to adequate review of a criminal conviction were a "fundamental interest," we do not believe that this right or interest was significantly impaired in the instant case. The cases speak loosely at times of invoking the standards of strict scrutiny whenever a fundamental interest is "involved." The facts in those cases make clear, however, that it is actually the significant "impairment" of the fundamental interest, not merely its "involvement" that has led courts to apply the strict standard.

In the instant case, there is probably some degree of detriment imposed on Bell by § 1222, Code Civ. P., but we believe it is slight. We have considered the two ways sugested by Bell in which an appeal is more advantageous than a petition for review: (1) because misdemeanants have more time to prepare arguments to present to the reviewing court than do contemnors like Bell; and (2) because misdemeanants are assured a hearing before the reviewing court and a full consideration of their case, while contemnors like Bell often have their petitions denied summarily without a hearing.

As to (1), we note that misdemeanants have a statutory allotment of time in which to prepare appellate arguments, as provided in the California Rules of Court 105 and 182. On the other hand, contemnors under § 1209, Code Civ. P., have no fixed time limits in which to file their petitions for review. While this allows them to take as much time as they please, as a practical matter they are forced to file their petitions within days or even hours if they wish to avoid incarceration. But we doubt whether a longer period would benefit contemnors significantly. Contempt cases generally present fewer and simpler questions for review than ordinary criminal cases. The contemning court will generally stay the execution long enough for the contemnor adequately to prepare the relatively simple petition. Bell, for instance, had the execution of his sentence stayed for five days while he prepared and filed petitions for review.

As to (2), we note that the California Rules of Court seek to guarantee that each misdemeanant will have a thorough consideration given to his case by the reviewing court. Rules 183, 190 and 106. On petitions by contemnors convicted under § 1209, Code Civ. P., no such rules are at hand to guide the judicial process.

We are not persuaded, however, that petitions for review are less adequately considered by the reviewing court than are briefs on appeal. Only if the petition can be disposed of on its face will the petitioner be denied a hearing. The petitioner with a serious claim will thus be on equal footing with a misdemeanor appellant with a serious claim.

Bell points to the fact that his first petition was denied a mere ten minutes after its filing. Yet Bell makes no showing that his petition on its face displayed sufficient merit to warrant longer deliberation. Even if the first petition was too hastily denied, any error would have been cured by consideration of the subsequent petitions. The second petition was denied four hours after its filing. This was time enough to allow for a full perusal of its contents and adequate consideration of its merits.

The mere fact that a decision is speedily forthcoming, therefore, is insufficient to raise a presumption that the reviewing court failed in its duty to consider a case thoroughly. To find a dereliction of duty we would require concrete evidence. Bell fails to adduce such evidence.

Therefore, even on the dubious assumption that the right to appeal is a "fundamental interest," we believe that the interest was not sufficiently impaired to invoke strict judicial scrutiny. We therefore shall judge the California statute under the general standard. Accordingly, § 1222, Code Civ. P., insofar as it denies the right to appeal, must be held valid so long as it rationally[12] furthers a legitimate, articulated state objective.

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[12]A statute does not "rationally" further certain goals merely because it *logically* tends to promote them. A legislature does not act "rationally" when it acts in logical furtherance of lesser goals at the gross expense of more vital goals.

Thus, to determine whether a statute is rational, the court must consider the statute's logical tendency to promote its avowed goals against its tendency to impair other, more important goals. This does not mean we shall oversee a legislature in its policy decisions, or try to impose our will in choosing among competing values. That

One objective behind § 1222, Code Civ. P., in the context of punitive sanctions, is to facilitate the preservation of order and administrative regularity. This objective is patently legitimate. We need only inquire, then, whether the California legislature had reason to believe that § 1222, Code Civ. P., would rationally further such goal.

Since contempt, unlike other criminal behavior, is a direct attack on the authority of the court and tends to thwart the processes of justice, the legislature might reasonably deem it desirable to devise special procedures to safeguard the courts. Section 1222, Code Civ. P., arguably provides this safeguard in two respects. First, it encourages the trial court to mete out necessary punishment, for a court might be reluctant to cite a person for contempt if conviction might lead to lengthy appeals which would further delay and disrupt the trial process. Second, it increases the deterrent value of the punishment, for a conclusive, nonappealable judgment of conviction is assuredly a more frightening prospect for the would-be contemnor than a judgment whose sting is mitigated by the delay of time-eating appeals.

We therefore hold that § 1222, Code Civ. P., rationally furthers a legitimate state objective and thus does not violate the equal protection clause.

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would exceed our province. But when a legislature's choice is manifestly contrary to certain basic values inherent in a just society, we must hold that choice to be irrational.

In the instant case, we see nothing in the statute to indicate that certain values basic to a just society are being sacrificed irrationally for the sake of inferior values. Hence in this case we should hold the statute "rational" so long as it tends *logically* to further its purposed objectives.

(b) *Right to bail*

Section 1222, Code Civ. P., as interpreted by the California Supreme Court, has been held to mean (1) that no contemnor except one convicted under § 166, P.C., may *appeal* his conviction, and (2) that no contemnor except one convicted under § 166, P.C., is entitled to *bail* pending review of his conviction by petition.

Bell lacks standing to argue the unconstitutionality of the denial of bail rights, for although he had no right to bail, he was granted a stay of sentence, during which he petitioned both the California Court of Appeals and the California Supreme Court. The stay was an equivalent of bail.

In *Barrows v. Jackson,* 346 U.S. 249 (1953), the Supreme Court stated the familiar rule that "a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation." (at 255). A corollary of this rule is that, if a statute contains separable provisions, a person may challenge only those provisions which operate to injure him, and he may not challenge those provisions that cause him no harm.

Bell therefore cannot be heard to argue that the rule as to bail, in its application to his case, denied him equal protection of the laws. ". . . [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines,*

362 U.S. 17, 21 (1960). This principle cannot be relaxed in the present case, for Bell lacks the type of relationship with other persons which might give him standing to assert their rights, and because persons adversely affected by the bail provision will be able adequately to protect their own rights regardless of the outcome of this litigation. *See Eisenstadt v. Baird,* 405 U.S. 438 (1972).

There is another reason that the question of the right to bail is not before us. This is a habeas corpus proceeding, the ultimate purpose of which is to secure the petitioner's release from unlawful custody. Bell could raise the bail question only if an improper denial of bail was the cause of his custody at the time of the instant petition. At the time Bell commenced this habeas corpus proceeding, however, the review of his contempt conviction had been completed within the state courts and, therefore, even if he was constitutionally entitled to bail pending state court review, that time had expired when this habeas corpus proceeding began. No relief can be afforded in this habeas corpus proceeding for the allegedly improper denial of bail, for the denial of bail was not the cause of Bell's custody at the time the petition herein was filed.

Due Process

Bell contends it was fundamentally unfair for the trial judge to find him in contempt summarily under § 1211, Code Civ. P. Of his various arguments in support of this contention, the majority are frivolous, but two warrant a short discussion. First, he argues

that the trial judge was personally embroiled with him and thus should have been disqualified from adjudging him in contempt. Secondly, he argues that the conviction was so erroneous as a matter of state law that it denied him due process.

When a judge becomes so "personally embroiled" with a lawyer that he is unable to sit impartially in judgment on the contempt charge, due process requires that he must be disqualified. *Mayberry v. Pennsylvania,* 400 U.S. 455, 465 (1971). But on the facts of this case, we are far from persuaded that the trial judge was "personally embroiled" with Bell. Bell's conduct did not vilify the judge. To the contrary, Bell was polite throughout. And the judge's comments on record do not demonstrate a bias or anger against Bell. Accordingly, we see no constitutional violation in the contemned judge sitting in judgment on the contempt charge.

As for Bell's argument that the conviction was flagrantly erroneous under state law, thereby denying him due process, we are not persuaded. Bell's conviction was reviewed three times in the higher California courts. Each time his conviction was allowed to stand. We infer that the higher California Courts found the conviction correct under the state law. The contention that the conviction was flagrantly erroneous is therefore without merit.

Conclusion

We hold that § 1222, Code Civ. P., does not violate the equal protection clause of the United States Con-

stitution. We hold also that § 1211, Code Civ. P., was not applied in violation of the due process clause of the Constitution. Accordingly, we reverse and remand with directions to deny the petition for habeas corpus.

Reversed and remanded with directions.[13]

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[13]On June 26, 1974, the Supreme Court decided *Taylor v. Hayes*, ___ U.S. ___ (42 U.S.L.W. 5180). There the judge, following the trial, proceeded to hold the petitioner in summary contempt. The Court held in part that because of the acrimony of the confrontation between the trial judge and the contemnor, another judge should have tried the contempt matter.

On July 9, 1974, in *Grossman v. Striepeke* (9 Cir., July 13, 1973, No. 72-2526; unpublished, the Supreme Court vacated the judgment and remanded for reconsideration in view of *Taylor v. Hayes, supra.* (42 U.S.L.W. 3710). As in *Hayes, supra*, the judge, following the trial, held Grossman in contempt.

The factual situations in both *Hayes* and *Grossman* were vastly different from the factual situation in the case at bar. In *Hayes* and *Grossman* the exchanges between the contemnor and the court were acrimonious. In each the contempt was imposed following trial.

In the case at bar, the contempt occurred when the trial was about to start. There was no acrimonious exchange between the court and contemnor. The judge simply ordered the attorney to proceed with the trial and inquired, "What is your reply to that?" Bell responded, "I refuse to go to trial, your Honor."

In *Hayes*, the Court stated (42 U.S.L.W. at 5183):

> "We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. *Ex parte Terry*, 128 U.S. 289 (1888). The usual justification of necessity, see *Offutt v. United States*, 348 U.S. 11, 14 (1954), is not nearly so cogent when final adjudication and sentence are postponed until after trial."

By way of comparison with the procedure followed in *Hayes*, the Court notes an important event which ordinarily occurs in a summary contempt proceedings such as we have before us:

> "Even where summary punishment for contempt is imposed during trial, 'the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution.' *Groppi v. Leslie, supra*, 404 U.S., at 504 (and cases cited therein)." 42 U.S.L.W. at 5184 (footnote omitted).

Added enlightenment is found in *Groppi* at the page cited by the Court as authority for its statement:

> "Where a court acts immediately to punish for contemptuous conduct committed under its eye, the contemnor is present,

of course. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations. Moreover, in such a situation, the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi v. Leslie*, 404 U.S. 496, 504 (1972) (footnote omitted).

Here the record reflects that Bell had an adequate opportunity to speak in his own behalf.

In a companion case decided on the same day as *Hayes, Codispoti v. State of Pennsylvania*, ... U.S. ..... (42 U.S.L.W. 5175 at 5177), the Court said:

> "There are recurring situations where the trial judge, to maintain order in the courtroom and the integrity of the trial process in the face of an 'actual obstruction of justice,' *In re McConnell*, 370 U.S. 230, 236 (1962); see also *In re Little*, 404 U.S. 553, 555 (1972), convicts and sentences the accused or the attorneys for either side for various acts of contempt as they occur. Undoubtedly, where the necessity of circumstances warrants, a contemnor may be summarily tried for an act of contempt during trial and punished by a term of no more than six months. . . ."

If the contempt in the case at bar, occurring at the commencement of a trial, could not be punished summarily by the judge before whom the contempt occurred, then no such contempt could ever be punished by the judge before whom it occurred.

Appendix H

United States Court of Appeals
For The Ninth Circuit

No. 72-2797

Edward C. Bell,
Petitioner-Appellee,
vs.
Richard D. Hongisto,
Respondent-Appellant.

[Filed Oct. 2, 1974]

ORDER DENYING THE PETITION FOR REHEARING AND REJECTING THE SUGGESTION FOR REHEARING IN BANC

Before: CHAMBERS, CARTER and WALLACE, Circuit Judges.

The panel having voted to deny the petition for rehearing and to reject the suggestion for rehearing in banc, and the petition having been circulated to all active judges, and no judge having voted for a rehearing in banc,

It Is Ordered that the petition is denied and the suggestion for rehearing in banc is rejected.